BERT N. SMITH
PAUL SMITH
v.
BUREAU OF LAND MANAGEMENT

IBLA 79-153 Decided July 11, 1980

Appeal from decision of Administrative Law Judge Robert W. Mesch dismissing the appeal of the decision of the District Manager, Elko Grazi District, Bureau of Land Management, vacating the Ruby No. 7 allotment management plan and establishing a new grazing system. Nevada 1-78-3.

Affirmed as modified.

1. Grazing and Grazing Lands -- Grazing Permits and Licenses: Generally -- Taylor Grazing Act: Generally

   Implementation of the Taylor Grazing Act of 1934 is committed to the discretion of the Secretary of the Interior. Protection and management of Federal range lands is a continuing responsibility and may not be divested through agreement with a private party. An allotment management plan is not such a permanently binding contract that the grazing user's refusal to agree to changes precludes BLM from modifying or vacating the plan upon a finding, rationally based, that the plan is inconsistent with BLM objectives and good range management.

2. Administrative Procedure: Burden of Proof -- Evidence: Burden of Proof -- Grazing and Grazing Lands -- Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Appeals -- Rules of Practice: Appeals: Burden of Proof

   A decision reached in the exercise of administrative discretion relating to the

adjudication of grazing privileges may be regarded as arbitrary and capricious only where it is not supportable on any rational basis, or where it is shown that it does not represent substantial compliance with the grazing regulations. The burden is upon the appellant to show by substantial evidence that a decision is improper or unreasonable.

3. Estoppel

The elements of an estoppel are the following: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Estoppel of the Government is an extraordinary remedy, especially as it relates to public lands, and is to be applied with the greatest care and circumspection.

APPEARANCES: Stewart R. Wilson, Esq., Wilson, Wilson, and Barrows, Ltd., Elko, Nevada, for appellants; James E. Turner, Esq., Office of Solicitor, Sacramento Region, Department of the Interior, for respondent.

OPINION OF ADMINISTRATIVE JUDGE BURSKI

Bert N. Smith and Paul Smith appeal from the decision of Administrative Law Judge Robert W. Mesch dismissing their appeal of the decision of the District Manager, Bureau of Land Management (BLM), of the Elko Grazing District vacating the allotment management plan (AMP) for th Ruby No. 7 allotment and establishing a new grazing system to be followed by the Smiths in using their grazing privileges on that allotment.

Appellants are ranchers in Ruby Valley, Elko County, Nevada. In 196 BLM adjudicated the grazing privileges of a number of ranchers in Ruby Valley including appellants. As a result of this action, BLM found that appellants held base property qualifications or adjudicated class 1 privileges of 2,456 animal unit months of feed (AUM's),

but that the authorized active use or grazing capacity of their allotment was only 1,103 AUM's. 1/

In 1972, BLM and appellants agreed to an AMP establishing a grazing system to govern appellants' use of the Ruby No. 7 allotment. The genera objective, as stated in the AMP, was "to protect, manage, and regulate th use of the multiple resources in a combination that will meet the needs o the various resource users." As a specific goal, the AMP contemplated producing a sufficient amount of usable forage to satisfy appellants clas 1 privileges of 2,456 AUM's by establishing a grazing system which would improve "watershed, wildlife, and forage conditions on the allotment" (AM p. 5). The AMP set up a grazing system which allowed a season of use for each pasture in the Ruby No. 7 allotment and under normal operation, utilized 2,880 AUM's, the estimated potential grazing capacity of the allotment. 2/ The AMP also provided the following:

> The normal operation is based upon the potential of the range. Evaluation studies, as outlined in Section IV, will be the basis for increases or decreases in allowed grazing use. The Federal Range Qualifications are in no way increased or decreased by this Allotment Management Plan.
>
> Any use above the adjudicated grazing capacity shall be licensed to the licensee as Temporary Non-Renewable until such time as it is determined that the additional forage is available for the licensee on a sustained-yield basis.
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> Application for a grazing license will be made annually by reference to this Allotment Management Plan.

(AMP, p. 9).

The concluding section of the AMP was captioned "Agreement" and reads

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1/ The allotment is situated in the Currie Planning Unit of the Wells Resource Area of the Elko District and consists of the Forest Pasture, th Kelly Store Field, the Native Pasture, the West Seeding (also known as Smith Seeding), and the East Seeding (also known as Murphy Seeding).

2/ There is a discrepancy in the total AUM's contemplated as calculated the AMP and as computed by Judge Mesch. We do not feel that this difference has a significant bearing on the outcome of this appeal.

> WE, THE UNDERSIGNED, concur in the management objectives set forth in this Plan, and will, restrict the livestock grazing as provided herein to meet these objectives.
>
> WE, THE UNDERSIGNED, understand that privileges so allowed herein remain subject to the applicable regulations.
>
> This Allotment Management Plan will remain in effect, as written, until such time that it is mutually determined a modification or change is desired. Modifications will be made with the concurrence of the parties concerned, indicated by initialing and dating of pages revised.

(AMP, p. 13).

In 1977, the District Manager of the Elko District 3/ concluded that the Ruby No. 7 allotment was generally in poor condition and deterioratin (Tr. 21). He then wrote to appellants suggesting changes in their grazin system (Tr. 15-16), but appellants responded that the changes would be unacceptable (Tr. 25). In early 1978 the District Manager issued a proposed decision revising the grazing system, which appellants protested After a meeting on the protest, the District Manager revised his decision to meet some of appellants' objections and issued a final decision on February 28, 1978. This decision vacated the 1972 AMP and established a new three pasture grazing system with one pasture in nonuse every year. The District Manager based his action on a determination that (1) the AMP authorized a level of use exceeding appellants' active base property qualifications and the grazing capacity of the Federal range involved; (2 the AMP failed to meet the physiological requirements of the vegetation o the range; and (3) appellants had failed to comply with the AMP grazing system from 1975-1977.

At a hearing before Administrative Law Judge Robert W. Mesch, appellants challenged the truth of these matters and asserted that the AM was a binding contract between BLM and themselves and that the District Manager's decision was arbitrary and capricious.

Judge Mesch first found that the evidence did not support the BLM assertion that appellants had failed to comply with the AMP. We agree. then concluded, however, that the AMP did authorize a level of use in excess of appellants' base property qualifications and the allotment grazing capacity in violation of 43 CFR 4111.4-3(c) (1977)

3/ The position of District Manager of the Elko District was held by different persons in 1972 when the AMP was drawn up and 1977-78 when it w vacated.

and 43 CFR 4115.2-1(e)(3) (1977) and that such a violation was sufficient grounds to modify or vacate the AMP. As to whether the District Manager should have modified the AMP rather than vacating it, he concluded that appellants had failed to satisfy their burden of proving that the Distric Manager's decision to establish a new grazing system was improper, citing 43 CFR 4.478(b). Thus, he dismissed the appeal.

On further appeal to this Board, appellants reassert their contentior that the AMP is a binding contract and that the District Manager's decisi was arbitrary and capricious. In addition, they argue further that BLM should be estopped from vacating the AMP because BLM has not met its obligations as to certain range improvements under the AMP.

[1] Implementation of the Taylor Grazing Act of June 24, 1934, as amended, 43 U.S.C. § 315-315f, 315h-315m, and 315n (1976), is committed t the discretion of the Secretary of the Interior. Section 2 of the Act specifically charges the Secretary with respect to grazing districts on public lands to "make such rules and regulations" and to "do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range * * *" (43 U.S.C. § 315a). 4/ The Secretary may not divest himself of that responsibility agreement with a private party.

Appellants argue that the AMP is a binding contract between BLM and themselves on the basis of the language of the final paragraph of the pla quoted previously in this opinion. BLM, as the Secretary of the Interior agent, has a continuing responsibility for the protection and management Federal grazing districts. An AMP, as defined in the regulations as they existed at the time of development of appellants' AMP, is simply "a progr of action designed to reach specific management goals." 43 CFR 4110.0-5 (1977). 5/ It is a tool

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4/ Provisions of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2743, amending the Taylor Grazing Act, reinforced the Federal commitment to protection and improvement of the Federal range lands. See 43 U.S.C. §§ 1751-1753 (1976).

5/ The Department's regulations on range management were amended on August 5, 1978, to incorporate provisions reflecting the Federal Land Policy and Management Act of 1976, supra. The revised regulations treat allotment management plans more extensively than did the previous regulations. See 43 CFR 4120.2-3. The definition of "allotment manageme plan" found at 43 CFR 4100.0-5(c) of the current regulations is as follow

"(c) 'Allotment management plan (AMP)' means a documented program which applies to livestock operations on the public lands, which

for cooperative management of the grazing lands where a private party desires grazing rights on Federal land, and it is implemented through grazing licenses issued in accordance with it. Such a plan may be consistent with the responsibilities delineated in the Taylor Grazing Act at the time the plan is developed, but it cannot, however, be viewed as permanently binding. Changed circumstances or the passage of a reasonabl period of time certainly warrant evaluation of the continued effectivenes of any AMP. If the AMP no longer meets its objectives with respect to go range management, a rational basis for change exists, and BLM has an obligation to revise or vacate it.

To the extent that a District Manager purports to issue a contract which cannot be modified without the concurrence of a licensee, such acti represents an abdication of the District Manager's responsibility to mana the public lands in accordance with the laws and regulations and proper range management. As such, the action is unauthorized and cannot serve t bind the Department permanently when conditions warrant changes to which the user will not agree. Cf. Nola Grace Ptasynski, 28 IBLA 256 (1976).

While an AMP must, therefore, be subject to the overriding obligation of the Department to administer the public lands, this does not mean that District Manager may unilaterally vacate or modify an AMP without any basis. Rather, the District Manager's action must itself comport with th laws, regulations, and proper range management.

To be consistent with BLM responsibilities, the AMP must comply with the regulations issued by this Department. Judge Mesch found that the Ru No. 7 AMP violated 43 CFR 4111.4-3(c) (1977) and 43 CFR 4115.2-1(e)(3) (1977) which read as follows:

§ 4111.4-3 Reductions.

* * * * * * *

(c) When the District Manager determines that the forage production potential, with improvements, of the

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fn. 5 (continued)
is prepared in consultation with the permittee(s) or lessee(s) involved, and which: (1) Prescribes the manner in and extent to which livestock operations will be conducted in order to meet the multiple-use, sustained-yield, economic, and other needs and objectives as determined f the public lands through land use planning; and (2) describes the type, location, ownership, and general specifications for the range improvement to be installed and maintained on the public lands to meet the livestock grazing and other objectives of land management; and (3) contains such other provisions relating to livestock grazing and other objectives as ma be prescribed by the authorized officer consistent with applicable law."

> Federal range area is significantly greater than the present allowable stocking rate, he will issue combination active use and suspended nonuse licenses or permits for not to exceed the forage production potential, except that at his option, he may apply paragraph (d) of this section in making the adjustment. The difference between the forage production potential and the present allowable stocking rate of the Federal range area will be held in a suspense status, provided that the aggregate of authorized active use and "suspended nonuse" shall not exceed the base property qualifications of any licensee or permittee.
>
> § 4115.2-1(e)(3)
>
> (3) No license or permit will confer grazing privileges in excess of the grazing capacity of the Federal range to be used, as determined by the District Manager, except as may be allowed under § 4111.4-2(c) and (d). [6/]

Appellants assert that these regulations apply to licenses and permits, not AMP's. On the face of the regulations, this is true; but appellants must recognize that grazing licenses and permits are based on related AMP's. 7/ The Ruby No. 7 AMP authorizes a use of 2,880 AUM's, th forage production potential of the allotment. The key phrase in the AMP states that "[a]ny use above the adjudicated grazing capacity shall be licensed to the licensee as Temporary Non-Renewable until such time as it is determined that the additional forage is available for the licensee or sustained-yield basis" (AMP, p. 9). Adjudicated grazing capacity, however, is not the same as adjudicated grazing privileges. The former relates to the land, while the latter relates to the individual who is possessed of the right to graze the land. In effect, the AMP purported t authorize 2,880 AUM's in grazing privileges and provided that any use abo that level would be authorized as "temporary non-renewable."

Under 43 CFR 4111.4-3(c) (1977), when forage production potential is greater than the allowable stocking rate, the District Manager is permitt to issue a combination of authorized active use and suspended nonuse licenses or permits, up to the potential AUM level.

6/ The citation to section 4111.4-2(c) and (d) is incorrect as there are no such paragraphs in section 4111.4-2. We believe that the correct reference should be to 43 CFR 4111.4-3(c) and (d). Paragraph (d) is not relevant to this appeal.

7/ Although this point was not specifically addressed in past regulation the current regulations state: "If allotment management plans have been prepared, the authorized officer shall incorporate these plans in grazing permits or leases when they are issued." 43 CFR 4120.2-3(d).

However, that regulation also prohibits issuance of a combination of use and nonuse which exceeds base property qualifications. The record in thi case does not reflect the level of active use authorized in appellants' licenses. One of the appellants testified that from 1972 through 1977 their annual use of the allotment averaged 900-1,000 AUM's per year (Tr. 43; see also Tr. 15). The AMP does not expressly provide for suspended nonuse licenses. Nevertheless, since the AMP envisages the licensing of 2,880 AUM's, either the active use license or a combination active use and suspended nonuse licenses could exceed appellants' base property qualifications of 2,456 AUM's in violation of the regulation.

The AMP is thus technically defective. This deficiency, however, could be easily remedied merely by changing the phrase "adjudicated grazi capacity" to "adjudicated grazing privileges" in the provision of the AMP cited above. The net result of such a change would be that appellants would be authorized to graze their full adjudicated privileges of 2,456 AUM's, with temporary nonrenewable licenses issued for the remaining 424 AUM's. BLM argues, however, and Judge Mesch so found, that such a change would violate the provisions of 43 CFR 4115.2-1(i) (1977). We do not agree.

That regulation provides:

> (i) Nonrenewable licenses. Nonrenewable licenses may be issued to nonpreference applicants only for the period specified by the District Manager and for the number of livestock for which range is temporarily available and which can be properly grazed without detriment to the operations on the range of applicants owning or controlling base properties in class 1 and class 2. [Emphasis supplied.]

BLM contends that this regulation authorizes issuance of temporary nonrenewable licenses only to nonpreference applicants. We read this provision, however, not as a limitation on who may receive a nonrenewable license but as a limitation on the circumstances in which nonrenewable licenses will be issued to nonpreference right applicants. BLM's interpretation would have the anamolous result of penalizing preference right applicants who may well be in the best situation to take advantage increased forage on the range. Such an interpretation is also inconsiste with other provisions of the regulations. Thus, 43 CFR 4111.4-2 (1977) provides that increases in grazing capacity will be apportioned "in a manner that will assist in the stabilization of livestock operations controlling qualified base property, with emphasis being given * * * to allocation of increased grazing capacity to operators or interests whose efforts were responsible for such increases." It would be impossible, however, to reward operators who were receiving their full privileges if nonrenewable licenses were only available to nonpreference applicants. W do not

agree with the interpretation of 43 CFR 4115.2-1(i) (1977) advocated by B and modify Judge Mesch's decision to the extent he adopted that position.

Thus, under our interpretation of the regulations, if the causative factor in the District Manager's decision vacating the AMP had been solel the excess authorized use, the simple modification noted above would have accomplished the result of comporting the AMP to the regulations, and we not believe the voiding of the entire AMP would have been warranted. The District Manager, however, also premised his action on the basis that the AMP failed to meet the physiological requirements of the vegetation on th range. We turn now to that question.

[2] It is an oft-stated truism that the Secretary of the Interior ha the right to rely on the conclusions of the Department's technical expert See, e.g., Exxon Corp., U.S.A., 15 IBLA 345, 354 (1974). Where, as here, decision is made within the field of expertise of the deciding official, the Board has consistently held that such a decision can be regarded as arbitrary and capricious only where it is not supportable on any rational basis. Colvin Cattle Co., 39 IBLA 176 (1979); Bert N. Smith, 36 IBLA 47, 50 (1978); United States v. Maher, 5 IBLA 209, 218, 79 I.D. 109, 113-14 (1972). See also Dunlop v. Bachowski, 421 U.S. 560, 573 (1975). The burden is upon the appellant to show by substantial evidence that a decision is improper or that he has not been dealt with fairly. Colvin Cattle Co., supra; Bert N. Smith, supra; John T. Murtha, 19 IBLA 97, 101 (1975); Claudio Ramirez, 14 IBLA 125, 127 (1973).

Moreover, as regards grazing, the applicable regulation, 43 CFR 4.478(b), expressly states that "[n]o adjudication of grazing [privleges] will be set aside on appeal, if it appears that it is reasonable and that it represents a substantial compliance with the provisions of Part 4100 o this title." Appellants bear a heavy burden of showing that the proposed plan was unreasonable; this, they did not do.

Appellants contend that the AMP grazing system should not be changed because it was based on a comprehensive study of the allotment area by BI over a long period of time and in their opinion reflects better range management (Tr. 80-81, 84-85). They also argue that the range is in bett condition than prior to adoption of the AMP (Tr. 55).

We concur with Judge Mesch in his finding that appellants did not sustain their burden of proof that the District Manager's conclusion as t the AMP's impact on vegetative resources was erroneous. The AMP itself provided for studying the effectiveness of the grazing system. After examining the conditions on the allotment, the District Manager concluded that even at the proper AUM level, the AMP did not meet the

requirements of the vegetation on the allotment (Tr. 43). His decision establishes a new grazing system based on the grazing capacity of the allotment, which balances appellants' needs with the physiological requirements of the vegetation. There was no evidence presented to conte the reasonableness of the system or the conclusions on which it was based other than appellants' opinion that the AMP system reflected better range management and fit in better with their grazing operation. Appellants admitted that they "could live with" the District Manager's plan if given some flexibility (Tr. 87). The District Manager notified appellants when he decided that a change was necessary and requested input from appellant in the process of developing a new grazing system (Tr. 15-16, 25). He adjusted that system to incorporate some of appellants' suggestions (Tr. 27). It is not arbitrary and capricious to revise or vacate the AMP, if after a period of implementation, the conditions on the allotment are not consistent with the objectives of the plan and are contrary to BLM's responsibilities for protecting and managing the grazing district.

Appellants' primary objection relates not to a diminished active use authorization, since no diminution has occured, but to changes in seasons and areas of use. Thus, appellants object to licensing of the Native Pasture for use from August 1 to October 31 in the second year of the rotation cycle because, they contend, the best growth occurs as a result snow run-off, and by August all such moisture would be dissipated (Tr. 55 62, 87, 96). The AMP, however, authorized use of the Native Pasture from August 16 to November 15. The new allotment plan actually benefits appellants since, in the first year of the rotation cycle, they will be licensed to use the Native Pasture from May 1 to July 31.

Appellants also adverted to the difficulty they will suffer in utilizing the Kelly Store Pasture at the same time they are using the Native Pasture (Tr. 86). In this regard, the Area Manager contended that present use of the Kelly Store Pasture "doesn't provide any rest for new seedling establishment" (Tr. 99). Indeed, the general justification for implementation of a 3-year rotation cycle was precisely the need to provi for a year of rest in which new seedlings could be regenerated.

[3] Appellants also charge that the District Manager should be estopped from vacating the AMP because BLM has not met its obligations under the AMP to make certain range improvements.

In Edward L. Ellis, 42 IBLA 66 (1979), the Board stated some of the principles governing the application of the doctrine of estoppel:

> In United States v. Georgia-Pacific Company, 421 F.2d 92 (9th Cir. 1970), the Ninth Circuit set forth the elements of an estoppel:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; (4) he must rely on the former's conduct to his injury.
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> In United States v. Wharton, 514 F.2d 406 (9th Cir. 1975), the first requirement that a party to be estopped must know the facts was interpreted to include those situations where the party to be estopped should have known the facts giving rise to the estoppel. 514 F.2d at 413. * * *
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> In United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973), the court included an additional test which was later approved by Wharton: "The Moser-Brandt-Schuster line of cases establish the proposition that estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel."
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> We agree with the district court in United States v. Eaton Shale Co., 433 F. Supp. 1256, 1272 (D. Colo. 1977): "The court is not unmindful that estoppel of the government is an extraordinary remedy, especially as it relates to public lands, and is to be applied with the greatest care and circumspection."

42 IBLA at 69-70, 72 (1979).

Assuming arguendo that estoppel might be evoked, we do not feel that the evidence in this case justifies application of the doctrine of estoppel. The AMP lists the projects which appellants refer to as "Proposed Improvements." There are no detailed descriptions of the projects and no indication when the projects were to be undertaken. Neither the District Manager's decision nor the case record indicates BLM position as to the status and effect of these improvements. There is no assertion of either intentional or inadvertent misrepresentation when the AMP was developed. Although appellants stated at the hearing that they spent more than $20,000 making their own improvements to the allotment, i is not clear what amount they spent on AMP improvements. Furthermore, ev if that amount were known, it would not be a true projection of injury since presumably appellants have benefited from improvements completed ar will continue to do so. Finally, there has been no showing that the alleged noncompletion of any improvement has had a detrimental effect on the allotment lands.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appeal from is affirmed as modified.

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James L. Burski
Administrative Judge

I concur:

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Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur, except that I would prefer not to rule upon whether, in furtherance of a proper purpose, the Secretary could enter into a binding contract which would encumber specific Federal land. 1/

Here, in section V of the May 22, 1972, agreement, the parties have stated: "WE, THE UNDERSIGNED, understand that privileges so allowed here remain subject to the applicable regulations." There was no intent to bi the Department in perpetuity, for the contract is subject to amendment or rescission under the regulations and applicable statutes.

Joseph W. Goss
Administrative Judge

1/ As an example of the Secretary's broad authority, the Secretary is authorized to sell the land and may impose appropriate terms and conditions. 43 U.S.C. § 1713 (1976). See 43 CFR 2711.5-2, effective July 10, 1980. 45 FR 39416 (June 10, 1980).